A **SETAPAK HEIGHTS DEVELOPMENT SDN BHD**

v.

TEKNO KOTA SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO. W-02-567-2003]
C 22 FEBRUARY 2006

CIVIL PROCEDURE: *Appeal - Fact, findings of - Interference by appellate court with findings of fact - Instances when appellate court will intervene with findings made by trial judge*

D ***CONTRACT:*** *Construction - Approach to question of construction - Duty of court to give effect to clear intention of the parties*

The appellant/defendant was the registered proprietor of a piece of land ("the land"). The appellant and the respondent entered
E into a sale and purchase agreement on 23 August 1995 whereby the appellant agreed to sell the land to the respondent for RM54,500,000. The 10% deposit of RM5,450,000 was paid by the respondent to the appellant upon the execution of the agreement. The remaining balance purchase price of RM49,050,000
F was to be paid upon fulfillment of certain conditions precedent as follows: the appellant was to obtain the Layout Plan Approval and furnish the respondent the proof of submission of the Development Order by the appellant to the various relevant authorities. The time period for the fulfillment of the said conditions precedent was
G six months from the date of the agreement. However the appellant did not obtain the Development Order Approval and hence did not fulfill the second condition precedent required of it. Further the Layout Plan Approval was obtained by the appellant only after the agreement had lapsed.

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The appellant terminated the agreement pursuant to cl. 5. Clause 5(a) concerned the forfeiture of deposit paid, in certain circumstances. Clause 5(b) concerns the refund of the said deposit. The respondent demanded the refund of the deposit from
I the appellant. A dispute arose as to whether the deposit was to be forfeited or to be refunded. The appellant claimed that the deposit was to be forfeited. The respondent commenced this

action against the appellant in the High Court for the refund of the deposit. The High Court allowed the respondent's claim and ordered the appellant to pay the respondent the sum of RM5,450,000. The appellant appealed in respect of this order.

Held (dismissing the appeal with costs)
Per Abdul Kadir Sulaiman JCA

(1) An appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluating the evidence. It is only in cases where the appellate court exercising an appellate jurisdiction is convinced that there was no judicial appreciation of the evidence adduced at the trial by the trier of fact or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord with the probabilities of the case, would the court intervene and upset the findings made by the trial judge, substituting therewith with its own findings. In this case there was no such fault in the conclusion made by the learned judge. (para 18)

(2) Clause 5 was a specific term of the agreement which the parties had incorporated by mutual agreement with the benefit of legal advice and cl. 5 had nothing to do with the doctrine of frustration which is embodied in s. 57(2) of the Contracts Act 1950. (para 20)

(3) The learned trial judge had correctly interpreted and applied cl. 5(b) of the agreement to the facts of the case and held that the respondent had discharged the onus that is upon it of proving that there existed circumstances beyond the control of the parties. Clause 5(b) specifically provided for the various contingencies to bring the agreement to an end and in such circumstances the monies have to be refunded to the respondent. It is the duty of the court to give effect to the clear intention of the parties as expressed in cl. 5(b) of the agreement which is in clear, unambiguous and unmistakable language. (paras 25, 26 & 27)

Bahasa Malaysia *translation of headnotes*

Perayu/defendan adalah pemilik berdaftar sebidang tanah ("tanah tersebut"). Perayu dan responden telah memasuki satu perjanjian jualbeli pada 23 Ogos 1995 di mana perayu telah bersetuju menjual tanah tersebut kepada responden untuk RM54,500,000. Deposit sebanyak 10% iaitu RM5,450,000 telah dibayar oleh responden kepada perayu selepas perjanjian tersebut ditandatangani. Baki harga belian sebanyak RM49,050,000 perlu dibayar selepas penepatan beberapa pra-syarat seperti berikut: perayu perlu mendapatkan Kelulusan Pelan Susunatur dan memberikan kepada responden bukti kemasukan permohonan untuk Perintah Pemajuan oleh perayu kepada semua pihak berkuasa yang berkenaan. Tempoh masa untuk menepati prasyarat-prasyarat tersebut adalah enam bulan dari tarikh perjanjian tersebut. Walau bagaimanapun, perayu telah gagal mendapat Kelulusan Perintah Pemajuan dan oleh itu tidak dapat menepati prasyarat kedua. Tambahan lagi, Kelulusan Pelan Susunatur telah diperolehi oleh perayu hanya selepas perjanjian tersebut telah tamat tempohnya.

Perayu telah menamatkan perjanjian itu di bawah kl. 5. Klausa 5(a) adalah berkenaan dengan pelucuthakkan deposit yang dibayar, dalam keadaan-keadaan tertentu. Klausa 5(b) adalah berkenaan dengan pengembalian deposit. Responden telah menuntut pengembalian deposit tersebut daripada perayu. Pertikaian telah berbangkit mengenai isu sama ada deposit tersebut boleh dilucuthakkan atau perlu dikembalikan. Perayu telah menuntut bahawa deposit tersebut boleh dilucuthakkan. Responden telah memulakan tindakan ini terhadap perayu di Mahkamah Tinggi untuk pengembalian deposit tersebut. Mahkamah Tinggi telah membenarkan tuntutan responden dan telah memerintahkan perayu membayar kepada responden sejumlah RM5,450,000. Perayu telah merayu terhadap perintah ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Kadir Sulaiman HMR:

(1) Sesuatu mahkamah rayuan itu tidak akan dengan sewenang-sewenangnya bercampur tangan dengan penemuan fakta oleh mahkamah perbicaraan kepada yang mana undang-undang telah memberikan tugas asas untuk menilai keterangan. Hanya di dalam kes-kes di mana mahkamah rayuan dalam menjalankan bidang kuasa rayuanya berpuas bahawa tidak terdapat pengamatan kehakiman keterangan yang telah diberikan semasa perbicaraan oleh hakim perbicaraan atau di mana faedah

pendengaran-penglihatan yang terdapat pada hakim perbicaraan telah tidak digunakan sebaik-baiknya atau bahawa penemuan yang dibuat oleh hakim perbicaraan tidak selari dengan kebarangkalian kes, mahkamah rayuan akan bercampurtangan dan mengalih penemuan yang dibuat oleh hakim perbicaraan dan menggantikannya dengan penemuanya sendiri. Di dalam kes ini tidak terdapat kekhilafan dalam keputusan yang dibuat oleh hakim yang bijaksana.

(2) Klausa 5 adalah suatu terma perjanjian tersebut yang spesifik yang mana telah dimasukkan oleh pihak-pihak melalui persetujuan bersama dengan faedah nasihat undang-undang dan kl. 5 langsung tidak berkaitan dengan doktrin kekecewaan yang terkandung di dalam s. 57(2) Akta Kontrak 1950.

(3) Hakim perbicaraan yang bijaksana telah dengan betul menginterprasi dan memakai kl. 5(b) perjanjian tersebut kepada fakta-fakta kes dan memutuskan bahawa responden telah mendiscajkan beban yang ada padanya untuk membuktikan bahawa terdapat keadaan yang di luar kawalan pihak-pihak. Klausa 5(b) secara spesifik memperuntukkan untuk pelbagai kontingensi untuk menamatkan perjanjian tersebut dan dalam keadaan sebegitu wang-wang tersebut perlu dikembalikan kepada responden. Adalah tugas mahkamah untuk memberi efek kepada niat jelas pihak-pihak seperti yang dinyatakan di dalam kl. 5(b) perjanjian tersebut dengan menggunakan bahasa yang amat jelas.

Case(s) referred to:

Brisdale Rasa Development Sdn Bhd v. Silver Concept Sdn Bhd & Anor [2001] 1 AMR 1087 ***(refd)***

Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd AIR [1965] SC 1288 ***(refd)***

Maxiseqar Sdn Bhd v. Silver Concept Sdn Bhd & Anor [2001] 7 CLJ 48 HC ***(refd)***

Ramli Zakaria & Ors v. Government of Malaysia [1982] CLJ 158; [1982] CLJ (Rep) 719 HC ***(refd)***

Satyabrata Ghose v. Muqneeram Banqur & Co & Anor AIR [1954] SC 44 ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 1 AMR 607 ***(refd)***

The Naihati Jute Mills v. Khaliram Jagannath AIR [1968] SC 522 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 33, 57(2)

Contracts Act [Ind], ss. 32, 56

For the appellants - Porres Royan (C Sri Kumar with him); M/s Sri Ram & Co
For the respondent - K Kirubakaran (S Malar with him); M/s Kiru & Yong

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5(S1)-22-225-1999]

Reported by Amutha Suppayah

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] On 16 March 2005 two appeals came up for hearing before us. One is Appeal No. W-02-567-2003 and the other is Appeal No. W-02-898-2004. The parties agreed that the disposal of Appeal No. W-02-567-2003 would render Appeal No. W-02-898-2004 academic. On that basis we commenced hearing of Appeal No. W-02-567-2003. We had on that day, 16 March 2005, dismissed the appellant's appeal in Appeal No. W-02-567-2003 with costs. In compliance with the agreement at the commencement of the hearing, the learned counsel for the appellant in Appeal No. W-02-898-2004 withdrew that appeal. In the circumstance, that appeal was struck off with no order as to costs. We directed that the deposit be refunded to the appellant in that appeal. We now give our reasons for the dismissal of Appeal No. W-02-567-2003.

[2] The brief facts leading to Appeal No. W-02-567-2003 are these. The appellant who was the defendant in the court below is the registered proprietor of a piece of land held under Grant No. 10101, Lot No. 14271, Setapak, Kuala Lumpur measuring approximately 283,026 square meters ("the said land").

[3] The appellant and the respondent entered into a sale and purchase agreement on 23 August 1995 whereby the appellant agreed to sell and the respondent agreed to purchase the said land at the purchase price of RM54,500,000 and upon the terms and conditions contained in the agreement.

[4] The 10% deposit of RM5,450,000 was paid by the respondent to the appellant upon the execution of the agreement. There remained the balance purchase price of RM49,050,000 which was to be paid in the following manner. 10% of the purchase price amounting to another RM5,450,000 was to be paid by the respondent to the appellant within 14 days after the respondent is in receipt of both the Layout Plan Approval and the Foreign Investment Committee ("the FIC") approval. The remaining balance of 80% of the purchase price amounting RM43,600,000 was to be paid by the respondent to the appellant's solicitors as stakeholders within three months from the date the agreement becomes unconditional which means that all the conditions precedent have been fulfilled by the parties.

[5] There were three conditions precedent to be fulfilled under the agreement. The first condition was for the appellant to obtain the Layout Plan Approval. The second condition precedent was for the appellant to furnish the respondent the proof of submission of the development order by the appellant to the various relevant authorities. The third condition precedent was for the respondent to obtain the FIC Approval. The time period for the fulfillment of the above three conditions precedent was six months from the date of the agreement or such extended period as to be mutually agreed upon by the parties.

[6] The period of six months stipulated in the agreement had expired on 22 February 1996. The respondent obtained the FIC Approval on 30 January 1996. The appellant obtained the Layout Plan Approval from the relevant authority but only on 12 March 1996, that is after the agreement had lapsed on 22 February 1996. However the appellant did not obtain the Development Order Approval and hence did not fulfill the second condition precedent required of it.

[7] As the second condition precedent was not fulfilled by the appellant and that the Layout Plan Approval was obtained by the appellant only after the agreement had lapsed, the parties were desirous of reviving the agreement and of varying and amending the terms of the agreement ("the principal agreement"). In the result the parties entered into a supplemental sale and purchase agreement on 23 August 1996 upon the terms and conditions contained therein ("the supplemental agreement").

[8] Under the terms of the supplemental agreement the balance purchase price amounting to RM49,050,000 was to be paid by the respondent to the appellant's solicitors as stakeholders within (10) weeks from the respondent's solicitors receiving the several documents stipulated in cl. 2(a) of the supplemental agreement. The respondent was also required to pay the appellant a further sum of RM500,000 as lump sum interest.

[9] Arab-Malaysian Bank Berhad ("AMMB") had by letter dated 11 April 1996 offered to the respondent a term loan/bridging loan facility of RM60 million to complete the purchase under the principal agreement. Subsequently by letter dated 23 January 1998 AMMB notified the respondent that the said term loan/bridging loan facility of RM60 million "will be temporarily suspended with immediate effect".

[10] In the meanwhile, on or about 21 January 1998 a meeting was held between Tan Sri Dato' Low Keng Huat and Ng Say Thin representing the appellant and Che King Tow representing the respondent in connection with the principal agreement and the supplemental agreement. Thereafter the parties exchanged a series of correspondence.

[11] The appellant terminated the principal agreement and the supplemental agreement by letter dated 5 February 1998 pursuant to cl. 5 of the principal agreement. The said clause contains two sub-cls. (a) and (b). It relates to non-payment of balance of purchase price. Sub-clause (a) concerns the forfeiture of deposit paid, in certain circumstances. Sub-clause (b) concerns the refund of the said deposit. After a series of correspondence between the parties which followed after the said meeting mentioned earlier, the respondent by letter dated 19 September 1998 *inter alia* demanded the refund of the deposit from the appellant. There began the dispute between the parties as to whether the deposit is to be forfeited or to be refunded, the appellant taking the stand that the said deposit is to be forfeited.

[12] So, on 5 April 1999 the respondent commenced the action against the appellant in the High Court below for the refund of the deposit plus interest thereon.

[13] After a full trial the High Court had on 11 June 2003 allowed the claim of the respondent and ordered the appellant to pay the respondent the sum on RM5,450,000 together with any accumulated interest thereon which was released to the appellant

on 13 March 1996 together with further interest on the entire sum calculated at the rate of 10% per cent per annum on a daily basis with effect from 2 June 1998 to date of payment plus costs. A copy of the order is at p. 15 of the appeal record. The present appeal is in respect of that order of the High Court.

[14] In the court below the parties had on 20 May 2003 formulated and agreed upon on the following three issues to be tried:

(a) Is the Plaintiff entitled to rely on Clause 5(b) of the principal agreement and obtain a refund of the deposit paid?

(b) Whether there was non fulfillment of any condition precedent on the part of the Defendant prior to termination of the principal agreement and the supplemental agreement?

(c) Whether the principal agreement and the supplemental agreement were terminated by mutual agreement between the parties thereto following the meeting held on or about 21st January 1998?

[15] At the trial the learned judge changed the order of the questions making issue (a) above into issue (c), issue (b) above to remain as issue (b) and issue (c) above into issue (a). The learned counsel for the appellant before us informed that no complaint is made of the change of the order by the learned judge. On the first issue as changed by him, the learned judge said in his judgment at p. 104 of the record of appeal:

The First Question

25. The question can be made more precise in this manner: (a) Whether there was an agreement to terminate, and (b) Whether there was an agreement at the same time that the deposit be forfeited.

[16] The learned counsel for the appellant submitted that by reframing the third issue as he did, the learned judge had made a fundamental error. He introduced an entirely new issue which was never raised by the parties nor was it part of the respondent's pleaded case. The appellant's case rested entirely on the respondent's failure to complete the transaction in the context of cl. 5(a) of the agreement and nothing else.

[17] Our answer to that is, with respect to the learned counsel, the case for the respondent is that the deposit ought to be refunded but the appellant's case is that it ought not to be refunded but stands as being forfeited. There lies the dispute to be resolved by the court in the suit by the respondent against the appellant. To narrow down the issue the parties framed one of the questions, ie, question 3, which was changed by the learned judge to be question (a). By that question alone as framed by the parties, it will not resolve the issue whether the agreement so had on or about 21 January 1998 involved the agreement on the forfeiture or otherwise of the deposit paid by the respondent. Hence the supplementary question arising out of question 3 mentioned by the learned judge as to whether during the said meeting of 21 January 1998, there was an agreement at the same time concerning the fate of the deposit, the learned judge had not introduced an entirely new issue which was never raised by the parties as so submitted by the learned counsel for the appellant. On the supplementary question posed by the learned judge, having heard and evaluated the evidence before him tendered on behalf of both disputing parties, he was of the view that the respondent's version that the deposit is refundable to be the more probable of the two versions. This is the finding of facts by the learned judge based on the assessment of the credibility of witnesses.

[18] The principles of appellate intervention with a finding of fact by the trial judge are well settled. We as an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluating the evidence. It is only in cases where we as an appellate court exercising an appellate jurisdiction are convinced that there was no judicial appreciation of the evidence adduced at the trial by the trier of fact or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord with the probabilities of the case, would we intervene and upset the findings made by the trial judge and substituting therewith with our own findings. In this case we see no such fault in the conclusion made by the learned judge. See the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 1 AMR 607.

[19] The learned counsel further argues that the appellant's case rested entirely on the respondent's failure to complete the transaction in the context of cl. 5(a) of the principal agreement and nothing else. Hence, the challenge on the learned judge's

going into the context of cl. 5(b) thereof. Again, with respect, the issue before the learned judge as agreed by the parties is on cl. 5(b): Is the plaintiff entitled to rely on cl. 5(b) of the principal agreement and obtain a refund of the deposit paid, which is the respondent's case in the suit. Clause 5(b) states:

> In the event that this transaction cannot be completed due to reasons beyond the control of the parties hereto, all moneys paid by the Purchaser to the Vendor shall be refunded to the Purchaser …

[20] In the circumstance, the learned judge could not be shifting the goal post to go to interpret the provisions of cl. 5(a). The learned counsel for the appellant argues that the sub-cl. 5(b) relates to frustration, but the learned judge answered that in his judgment beginning from para. 61 at p. 118 of the record. According to him, cl. 5 is a term of the agreement between the parties who had foreseen and chosen to provide specifically for the eventuality and therefore has nothing to do with the doctrine of frustration of contracts as understood generally. He then gave his reasons for holding that the appellant was liable under the provisions of cl. 5(b) of the principal agreement. We accept his reasoning and see no valid reason to fault him in the circumstances. We agree with the learned trial judge's finding that cl. 5 is a specific term of the agreement which the parties had incorporated by mutual agreement with the benefit of legal advice and cl. 5 has nothing to do with the doctrine of frustration which is embodied in s. 57(2) of the Contracts Act 1950.

[21] The Federal Court had held in the case of *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] CLJ 158; [1982] CLJ (Rep) 719 that the relevant provision on the doctrine of frustration is set out in s. 57(2) of the Contracts Act 1950. In the Indian Supreme Court case of *The Naihati Jute Mills v. Khaliram Jagannath* AIR [1968] SC 522, it was held under headnote as follows:

> Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be express or implied, in cases where the court gathers as a matter of construction, that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such

A cases would be outside the purview of Sections 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under Section 32.

[22] In the case of *Satyabrata Ghose v. Muqneeram Banqur and Co. and Another* AIR [1954] SC 44 at p. 48 the Indian Supreme Court also held as follows:

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> According to Indian Contract Act, a promise may be express or implied vide Section 9. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

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[23] Section 56 of the Indian Contracts Act is in *pari materia* with s. 57 of our Contracts Act 1950. Section 32 of the Indian Contracts Act is in similar terms to s. 33 of ours.

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[24] The cases of *Brisdale Rasa Development Sdn Bhd v. Silver Concept Sdn Bhd & Anor* [2001] 1 AMR 1087 and *Maxiseqar Sdn Bhd v. Silver Concept Sdn Bhd & Anor* [2001] 7 CLJ 48 have no relevance to this appeal before us. In both the *Brisdale* and *Maxisegar* cases there was no provision at all in the respective sale and purchase agreements that are similar or identical to cl. 5(b) of the agreement in this appeal before us. Both the *Brisdale* and *Maxisegar* cases deal with the doctrine of frustration which is not an issue in this appeal. Therefore the appellant's reliance on the *Brisdale* and *Maxisegar* cases are wholly misplaced. Each case must be decided on the specific terms of the relevant sale and purchase agreements and based upon its own peculiar facts.

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H **[25]** The learned trial judge had correctly interpreted and applied cl. 5(b) of the agreement to the facts of the case and held that the respondent had discharged the onus that is upon it of proving that there existed circumstances beyond the control of the parties.

I **[26]** The crucial words found in the opening paragraph of cl. 5(b) of the principal agreement are that "In the event that this transaction cannot be completed due to reasons beyond the

control of the parties hereto, all monies paid by the purchaser to the vendor shall be refunded to the purchaser ..." make it unequivocally plain and clear in unmistakable language that the parties have specifically provided in the agreement for the various contingencies to bring the agreement to an end and in such circumstances the monies have to be refunded to the respondent.

[27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl. 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd* AIR [1965] SC 1288 it was held that:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[28] In our view, the learned judge has correctly interpreted the purport of sub-cl. (b) of cl. 5 of the principal agreement in the way he reasoned out in his judgment.

[29] We had therefore dismissed the appeal with costs. We affirmed the order made by the High Court.

[30] My learned brothers Richard Malanjum and Tengku Baharudin Shah b Tengku Mahmud JJCA have read the draft and had given their agreement to it.